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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.
No. 235.

UNITED STATES OF AMERICA,

Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA and IRA BOONE,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

JENNINGS & BELCHER,
808 Security Building, Los Angeles 13,
Attorneys for Standard Oil Company of California and Ira Boone.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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The respondents file this brief in opposition to the petition for writ of certiorari heretofore filed herein.

Statement.

In addition to the matters set forth in the statement in the petition, it should be noted that the ground of recovery, as stated in the complaint in this case, was that the soldier John Etzel, was the "servant" of the plaintiff. [Record, pp. 2 and 4.] The right of recovery was not based upon any assignment from the injured man for none was either alleged or proved. Nor was it based upon any right of subrogation for none has ever been claimed.

The complaint [Record, p. 4] after alleging that the services of John Etzel were lost to plaintiff during the time he was laid up, then goes on and alleges "and also by reason thereof, plaintiff became liable to pay and did pay John Etzel as compensation salary and wages for the aforesaid period the sum of $69.31 and that by reason of the injuries sustained by John Etzel, the plaintiff has expended for hospital care the sum of $123.25." Thus, the complaint on its face recognizes that the services of John Etzel which were lost to the plaintiff were something different from and outside of the payments which the Government, plaintiff herein, paid to him and for his benefit.

It should also be noted that the findings of fact [see par. 3, Record, p. 28] of the trial court specifically reject the idea that John Etzel, the injured man, was a servant of the plaintiff. While it is stated in a note thereto that the words "and as such servant of plaintiff" were stricken at the request of counsel for defendants, as per letter dated June 8, 1945, that letter, as appears in the Record, page 26, merely called the attention of the trial court to the fact that any such finding was contrary to the opinion of the court. Thus, under the record, although this action was brought upon the theory that the injured man was the servant of the plaintiff, the trial court rejected that theory, declined to find that the relation of master and servant existed, and based its judgment solely upon the finding that the injured man, John Etzel, was a member of the Army of the United States of America.

There is presented at the outset of this case the anomalous situation that the trial court rejected the idea that the master and servant relation was involved, declined to find that such relation existed, and yet the petition for the writ states (p. 2) that the statute involved in Section 49 of the California Civil Code, which provides in substance that the rights of personal relations forbid any injuries to a servant which affects his ability to serve his master. In other words, stating the matter baldly, counsel for plaintiff rely upon Section 49 of the California Civil Code whereas the court has found that the relation of master and servant does not exist and impliedly, therefore, that no cause of action exists under the California Civil Code upon which counsel for plaintiff relies.

With this preliminary statement, we now proceed to examine more critically the authorities and law applicable to the facts under the following general outline.

I. The relation of master and servant did not exist between the government and the soldier John Etzel. In the absence of such relation, no cause of action exists in the Government either under California law, Federal law, or common law.

II. Even if the relation of master and servant could be supposed to exist between the petitioner and the soldier, no cause of action rests in the petitioner to recover from a third party, such as respondents, the money paid by petitioner to the soldier for his compensation as a soldier during the time he was incapacitated nor for the money paid by petitioner for the hospital expenses of such soldier.

I.

The Relation of Master and Servant Did Not Exist Between the Government and the Soldier John Etzel. In the Absence of Such Relation, No Cause of Action Exists in the Government Either Under California Law, Federal Law, or Common Law.

Let us examine first the contention now made by petitioner concerning the alleged right of petitioner to some right of recovery now claimed to exist under federal law. No federal statute is cited under which it is claimed the petitioner has any right of recovery nor have we discovered any. The opinion of the Circuit Court of Appeals points out that there is no federal statute which might afford the government a means for bringing the action [Record, p. 42]. It does not appear from the petition just what counsel for petitioner have in mind in referring to "federal law." The argument is made (in spite of the finding of the trial court that the relation of master and servant did not exist) that petitioner is entitled to recover upon the ground that the injured man was performing services and therefore petitioner is entitled to recover not upon any common law theory of master and servant but merely by reason of the relation between the government and its soldier. So far as we have discovered, the common law has never been supposed to give a cause of action in such a case as this without being predicated upon the master and servant relationship, except in one case, *Attorney General v. Valee Jones* (1935), 2 K. B. 209, which we shall hereafter refer.

As pointed out in the opinion of the Circuit Court of Appeals, the general rule has been held to be that when the United States comes into court to assert a claim, it so

far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. *U. S. v. The Thekla*, 266 U. S. 328, 340. This rule that where the United States voluntarily goes into court it must do so as other suitors has been recognized from the early times. See *Brent v. Bank of Washington*, 10 Pet. 596, 614; *Mitchell v. Peters*, 9 Pet. 711, 743. It was applied in the case of *U. S. v. Moscow Idaho Seed Co.*, 92 F. (2d) 173, 174, in a case similar to the one at bar. There the United States went into court as plaintiff in an automobile damage case, claiming damages to its automobile driven by one of its employees, and the court held that the issue should be determined in accordance with rules of law applicable between private litigants. We believe the doctrine enunciated in the foregoing cases constitutes the broad general rule applicable to suits when the United States comes into court as a plaintiff.

The cases mentioned by counsel for petitioner on page 13 of the petition do not affect the general principal but merely illustrate certain exceptions. Thus, in *United States v. Allegheny County*, 322 U. S. 174, it was decided that where property is owned by the United States, that property cannot be taxed by any local municipality under subterfuge of taxing one possessing and using the property under a contract with the United States for this would, in effect, be permitting a state under its laws to tax the United States, which cannot constitutionally be done. The point decided in *Clearfield Trust Company v. United States*, 318 U. S. 363, was that the rights and duties of the United States on commercial paper which it issues are governed by federal rather than by local law.

The case of *Board of Commissioners v. U. S.*, 308 U. S. 343, holds in substance that the above doctrine does not

mean that laches and state statutes of limitation may be applied against the United States. This would be contrary to the general rule that statutes of limitation do not operate against the sovereign unless specifically so provided. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U. S. 447, was decided under a statute which provided by its terms that all suits of a civil nature at common law or in equity to which the Federal Deposit Insurance Corporation was a party should be deemed to arise under the laws of the United States, with certain exceptions not pertinent. To similar effect is *Deitrick v. Greaney*, 309 U. S. 190, which holds that judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state, question.

One other case should perhaps be mentioned as cited by petitioner in the petition for rehearing before the Circuit Court of Appeals. It is *Dailey v. Parker*, 152 F. (2d) 174. In that case the court was considering the rights of children to claim damages against one who, by enticement and wrongdoing, had taken from them the support and maintenance of their father. There was no statute upon the matter, as in our case, nor were there any decisions of the said court. The court held that in the absence of any statute or decisions, it would decide the matter for itself and used this very pertinent language in referring to the rights of the children.

> "They will be denied if it appears that the state court has spoken and denied them. If said rights have not been denied in the state court, we see no reason why the federal court should be more prone to deny them or grant them than the state court. If the state court has not acted, we are free to take the course which sound judgment demands."

Not only is there no federal statute giving the government a right of action in this case but, on the contrary, the federal statutes provide that:

> "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."
>
> 1 Stat. at Large, 73, 92, Chap. 20; 28 U. S. C. A. Section 725.

And this statute was authoritatively applied in accordance with its terms in *Erie v. Tompkins*, 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 1188. See, also, *West v. American Telephone & Telegraph Company*, 311 U. S. 223; 61 S. Ct. 179; 85 L. Ed. 139.

From what has been said, it is apparent that counsel for petitioner has not pointed out any federal law which he claims to be involved in the decision of this case.

We pass, then, to a consideration of the applicable statute, namely: Section 49, subdivision c, of the California Civil Code and to the relation existing between the government and its soldiers.

The only statutory authority in California for an action by a master arising out of injuries to his servant is contained in Civil Code, Section 49, subdivision c. This section, so far as pertinent here, reads as follows:

> "The rights of personal relations forbid:
>
> "(c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction, or criminal conversation."

It may be noted in passing, and to this we shall advert again, that the injury referred to in the section is one "which affects his ability to serve." In other words, the action recognized by this section is an action arising from inability to serve.

Certain statutory provisions in California, in addition to Civil Code, Section 49, give a right of action by one for the injury or death of another. Thus, by section 376 of the Code of Civil Procedure, a right of action is given to a father for the injury or death of a minor child or to a guardian for the injury or death of a ward. Section 377 of the Code of Civil Procedure gives a right of action for death of an adult. Section 375 of the Code of Civil Procedure provides for an action by a parent for the seduction of a female child below the age of legal consent. California Workmen's Compensation Law gives an employer the right under certain circumstances to maintain an action against a third party tort feasor. Aside from the causes of action so provided, there do not appear to be any statutory provisions in California giving a right of action in one person for injuries sustained by another.

It should be remembered also that prior to 1939 Section 49 of the California Civil Code was much broader and gave a right of action for the abduction of a husband from his wife or of a parent from his child, for the abduction or enticement of a wife from her husband, the seduction of a wife, daughter, orphan sister, or a servant. In 1939, by California Statutes 1905, page 68, Section 49 of the Civil Code was amended so as to take away the foregoing rights of action, leaving the section as it now exists. Both before and after the foregoing amendment of 1939, Section 49 of the Civil Code was in dero-

gation of the common law and in California the rule of the common law that statutes in derogation thereof are to be strictly construed has no application. See Section 4, California Civil Code. Thus, California, having legislated on the subject as to what disturbances of personal relationships give rise to a cause of action, has indicated its clear intention that a right of action shall exist only in the instances permitted by statutory law.

Certain it is that there is no California Statute specifically granting a right of action to anyone on account of injuries to a soldier. Therefore, under California Statutory Law, unless a soldier is a servant of the United States and unless the United Sttaes is his employer or master within the meaning of the terms "master and servant," there is no statutory provision in California for the maintenance of an action such as this.

At common law, also, the rule was the same. In other words, unless the relation of master and servant existed, there could be no recovery by one person for injuries sustained by another.

Bartley v. Richtmyer, 4 N. Y. (Comstock) 38.

This was an action for damages for seduction of the plaintiff's stepdaughter. Common Law based the right of action for seduction of a daughter upon the theory that the relation of master and servant existed between the father and daughter. In this case it is said (p. 340):

> "When the daughter is of full age, the father is not entitled to her services; and he cannot maintain this action without showing that the relation of master and servant actually existed at the time of the injury."

And, again:

"The gist of the action is loss of service."

A little later in the opinion, the court, in explaining the nature of the action, says:

> "The courts went to the full length of their powers when they held that the relation of parent and child might be regarded as that of master and servant for the purpose of supporting this class of action."

The case of *Nickleson v. Stryker*, 10 Johnson (N. Y.) 115, was an action by a father for the debauching of his daughter, who was an adult. As above stated, such an action at common law was allowed only upon the fiction or theory that the daughter was the servant of her father. In this case, the court holds that whereas, if a daughter is a minor, the father's right to her services may be presumed, yet, where a daughter is of age,

> "she must be in her father's service, so as to constitute, in law and in fact, the relation of master and servant, in order to entitle her father to a suit for seducing her."

The reason for the rule is stated as follows in the case of *Woodward v. Washburn*, 2 Denio, 369, 374:

> "The reason and foundation upon which this doctrine is built seem to be the property that every man has in the service of those whom he has employed, acquired by contract of hiring, and purchased by giving them wages."

Originally, it seems the Common Law gave the master no right of action against a third person for an injury inflicted upon his servant, causing loss of service, except

where the servant was a menial one. In other words, the master was held to stand in *loco parentis.*

Burgess v. Carpenter, 2 So. Car. 7.

At Common Law the master had a cause of action for loss of services of a servant because he had a certain property right in the services and it was this property right which the common law sought to protect and which formed the basis of an action.

Tidd v. Skinner, 225 N. Y. 422, 122 N. E. 247.

Thus, it would appear that both under the Common Law and under California Statutory Law, unless the relation of master and servant existed as between the Government and the injured soldier, John Etzel, the plaintiff can have no cause of action for loss of services against a third person arising out of the tortious injuries to the soldier.

What, then, is the nature of the relation existing between the sovereign and its soldier? Is that relation one of master and servant or is it something different? We have already pointed out that the trial court in this case declined to find that the relation between the government and the soldier, John Etzel, was that of master and servant. The effect of the trial court's finding was that the relation did not exist. We shall, however, proceed to examine the question more at large.

It has been answered several times in this country although not until recently in any action similar to the present one. Since the judgment was rendered in the instant case, another federal court had occasion to consider the question in the case of *U. S. v. Atlantic Coast Line R. Co.,* 64 Fed. Supp. 289, and held that there was no cause of action in the government to recover the cost of

hospitalization, nursing care, and wages paid to an injured sergeant whose injuries had been caused by the tortious act of the defendant. The opinion holds that the relation existing between the government and the soldier was not that of master and servant and was not such as to give rise to any cause of action in the government to recover its expenditures.

The general rule seems to be that the soldier is not acting as an employee or a servant of his government but is performing his duties in an entirely different capacity. He is performing his general duties as a citizen to defend and protect his country. The matter was considered in the case of *Goldstein v. State*, 281 N. Y. 396, 24 N. E. (2d) 97, which involved the relation of a state militia man to the State of New York. The court, in discussing the question as to whether such a militia man or soldier (for he certainly is a member of the armed forces) is a servant and after pointing out that employees generally under our system of government are free men and have the same standing, rights, and privileges possessed by other members of our body politic, who may work or not according to their own free will, and if engaged in work may quit at any time if they desire without liability except when prevented by the terms of some express contract, and may even engage in strikes against their employers, says:

> "Upon the other hand, when a man becomes a member of the State Militia, he must, when in active service, surrender for the benefit of the State certain of the privileges enjoyed by working men who are employees. Under the Military Law (Consol. Laws, Ch. 36) a member of the Militia may be tried for various military offenses, for acts which are not illegal under any other law. He may be tried and

punished by a military tribunal and if found guilty may be punished by fines and in certain cases by imprisonment. He cannot quit while in active service without consent of his superiors. Members of the State Militia do not become members for the purpose of receiving the small per diem allowances awarded them by the State while they are in active service * * *. *It seems clear that one who joins the State Militia and is engaged in active service therein is in no sense an employee of the State. He is simply performing a duty which he owes to the sovereign State as a resident and citizen.* It makes no difference whether he does that voluntarily in time of peace or in response to the call of the Governor in time of trouble." (Italics ours.)

A similar conclusion was reached by the Supreme Court of Illinois in the case of *Hays v. Illinois Terminal Transportation Co.*, 363 Ill. 397, 2 N. E. (2d) 309. The court says:

"The relation between the State and those who are in voluntary military service is essentially different from the relation which obtains between master and servant. Military service is based upon the duty which every citizen owes to the sovereign and differs from ordinary employment in this: That the enlisted man cannot terminate his service at will. * * * It thus appears that although an enlistment is a contract, it is not the usual contract of employment contemplated by the Workmen's Compensation Act."

The same subject was also discussed by the Supreme Court of Nebraska in the case of *Lind v. Nebraska National Guard*, 144 Neb. 122, 130, 12 N. W. (2d) 652. The Nebraska Court stated:

"We are disposed to agree with the conclusion arrived at by the courts of New York and Illinois. We

adopt the view that members of the Nebraska National Guard are not employees of the state or any agency created by it within the meaning of the Workmen's Compensation Law but that as members of the National Guard, when on duty, are engaged in the performance of the duty which the citizen owes to the sovereign of which he is a part along with every other citizen."

Cogent support is given to these authorities by the opinions of this court in *Selective Draft Law Cases*, 245 U. S. 366, 38 S. Ct. 159, 62 L. Ed. 349, and in *United States v. Schwimmer*, 279 U. S. 644, 49 S. Ct. 448, 73 L. Ed. 889, wherein it is held that a citizen, in rendering military services in time of war, is merely performing a duty which rests upon him as one of the obligations of citizenship.

Diligent search has discovered only two other cases similar to the case at bar. One arose in England. It is the case of *Attorney General v. Valle-Jones*, 2 K. B. (1935) 209. It was much relied upon by plaintiff in the trial court. In that case, the Crown sought to recover wages paid to and hospital services paid for certain injured aircraftsmen who sustained their injuries in an accident caused by the negligence of the defendant. The Crown was permitted to recover. This case is of no assistance in attempting to determine what relation exists between a government and its soldiers. The question as to whether the relation of master and servant existed between the Crown and the airmen was neither argued nor decided. That question seems not to have been raised at all by the counsel for the defendant. Upon that question the case, in effect, went by default. The only points decided by the court were two: That the wages paid to

the airmen during their disability could be recovered, as could likewise the cost of medical and hospital treatment. There is but little authority cited and the decision is of no value in discovering the true relation existing between a government and a soldier.

The only other case which has been discovered and which involves an exactly similar question arose in Australia. It is the case of *Commonwealth v. Quince*, originally decided in the Supreme Court at Brisbane and reported in the Queens Law Reporter of August 28, 1943, page 91, and later, upon appeal, the opinions appear in the Argus Law Reports, 50 *et seq.* and 68 Comm. L. R. 227. In the case just cited, the Commonwealth sought to recover from the defendant, by whose negligence an airman of the Royal Australian Air Force had been injured, certain sums which the Commonwealth had either paid to the airman or had paid out for his benefit as follows: £108 8s paid to the airman for his services from the time of injury to the date of his discharge, during which period the airman performed no services; £286 2s 1d being the value of hospital treatment furnished by the Commonwealth to the airman prior to his discharge; £72 19s 7d being the value of hospital treatment furnished to the airman after his discharge; £60 4s being the amount of the pension paid to the airman after his discharge and still being paid at the time of trial; and £1 19s 7d being the value of items of clothing worn by the airman at the time of his injuries but which belonged to the Commonwealth and were destroyed in the accident. There, as in our case, the plaintiff based its right of action on the right of a master to sue for loss of services of a servant due to the negligent act of the defendant. It appeared that the airman had already recovered a judgment against the

same defendant for a sum said not to include the items sued for by the Commonwealth. The Commonwealth was not permitted to recover except for the value of its property, the clothing worn by the airman which was destroyed in the accident. Both in the trial court and on appeal recovery was denied to the Commonwealth and it was held that the relation of master and servant did not exist between the Commonwealth and its air force man and that therefore there was no cause of action. Although not so authoritative as the opinions on appeal, we recommend the opinion of the judge of the Supreme Court who tried that case as a learned discussion of the entire subject and a comprehensive review of the authorities and the reasons for his conclusions. The opinion points out that in the case of *Attorney General v. Valle-Jones*, 2 K. B. (1935), 209, counsel admitted and the judge therefore assumed that the relation of master and servant subsisted between the Crown and the airman and therefore the court never decided the question at all. This failure of the trial court in the *Valle-Jones* case to pass upon the nature of the relationship existing between the government and the members of its armed forces is also noted and commented upon in the opinion in the foregoing case of *United States v. Atlantic Coast Line R. Co.*, 64 Fed. Supp. 289.

The Australian case, therefore, is squarely in point on the matter at issue here and the courts there reached a conclusion identical with that announced by the Circuit Court of Appeals in the case at bar. So far as diligent search has disclosed, it is the only case in the United Kingdom involving a cause of action identical with that sued upon by the plaintiff in the case at bar in which all the aspects of the action are analyzed, considered, and decided.

In the trial court the plaintiff proceeded upon a sort of dual theory to the effect that the relation of master and servant existed between the plaintiff and the injured soldier; or, if not, then in any event a status existed which bore certain simliarities to the relation of master and servant and therefore the action ought to be allowed. The learned trial judge, both in his opinion and in the findings, discarded the master and servant doctrine and adopted the theory that the relation was a status which might be called a "government and soldier relation" and then concludes that by reason of this status, a right of action in the plaintiff exists. The only portion of the findings dealing with this particular matter is paragraph III thereof, in which it is found that the soldier, John Etzel, was "a member of the Army of the United States of America." [Record, p. 28.]

But it will not do, we think, merely to call the relation between the government and a soldier a status and conclude that therefrom a cause of action arises. The failure of such reasoning and argument is pointed out by the judge of the Supreme Court at Brisbane in the case of the *Commonwealth v. Quince*, heretofore referred to, where he says:

> "I think it is not competent for a judge to invent a new liability arising out of some status which is not that of parent and child or husband and wife merely because that status in some way resembles the relationship of master and servant."

If the fact that a status exists is to be of controlling effect, then what is to be said of several other varieties of relations which closely resemble the relationship of master and servant, perhaps even more closely than that

of the relationship of the government and its soldier? For instance, the status of principal and agent. Here substantially the only difference between the relation of principal and agent and the relation of master and servant is the absence of complete control in the principal over the activities of the agent. Otherwise the analogy between the two is substantially identical. They both arise out of contracts of employment under which the principal on the one hand and the master on the other pays to the agent or to the servant certain wages or salary. The agent in the one case and the servant in the other are subject to the direction of the principal or master in fulfilling the terms of the employment. In spite of the close resemblance of the two relationships, it has never been supposed, so far as we are aware, that any valid claim can be made by a principal against a third person on account of injuries sustained by the agent which impair or destroy the agent's ability to fulfill his contract of employment with the principal. Nor do we apprehend that this rule would be changed even if the principal had agreed with the agent to continue the latter's salary during a period of disability occasioned by an accident.

Mention might also be made of the status of partners which might be described as a sort of mutual employment, each by the other. Each works for the other's benefit and each, in effect, pays the other for his services. But we do not think it has ever been asserted that one partner has a cause of action against a third person arising out of injuries to the other partner which destroy or impair his ability to work.

If one examines critically the relation of a soldier to his government, it becomes at once plain that while there are points of resemblance with the relation of a servant

to his master, these points of resemblance are few and the points of dissimilarity are very many. Perhaps the main points of resemblance are that the soldier does perform certain services and he does receive certain pay therefor. The points of dissimilarity are, however, so numerous that it would scarcely be possible to name them all without overlooking some. We shall refer to some of them which are most apparent. While there is an agreement or contract of sorts between the government and the soldier, it is not a contract of employment but is a contract which changes the status. The Supreme Court of the United States has so declared in *In re Grimley*, 137 U. S. 147, 151. The agreement must be entered into by the soldier whether he desires it or not. Indeed, in the instant case, the soldier, John Etzel, was a draftee—not a volunteer—and became a soldier merely because the law required him to report for induction. [Record, p. 34.] So far as appears, he may have profoundly desired to remain out of the army. In any event, he had no choice. The soldier has no part in fixing the terms of his enlistment nor of the services which he is to perform. He has no right to bargain as to wages or salary. He takes whatever the government gives him. He does not receive wages comparable to private employment. He cannot quit if he becomes dissatisfied. He must serve so long as the government desires to retain him. He cannot strike. He has nothing to say as to the kind of food he shall eat nor the sort of clothes he shall wear. He can be discharged at any time, even against his will and

without the government's incurring any liability for damages. For injuries negligently inflicted by another soldier or through the furnishing to him of defective equipment, he has no cause of action against the government, although the government may, and usually does, make certain provisions for disability payments or pensions in the event of injury. While he is not liable to a suit for damages at the hands of the government for failure properly to perform his duties, he may be punished, cast into jail, and if the offense be serious enough, his life may be forfeited. He is practically not a free agent at all. He does, eats, and wears whatever the government may say he shall do, eat, and wear and at such times, places, and under such circumstances as the government may choose. Nor do we think it has ever been supposed that the soldiers of the United States were entitled to any benefit under Workmen's Compensation Laws. Such are some of the differences in the relation of a soldier to his government as compared to the relation of a servant to his master. We make no claim that this list is all inclusive. Other important differences may and probably do exist.

For all these reasons, we respectfully assert that the relation of master and servant did not exist as between the plaintiff and the soldier John Etzel and that unless the courts are to invent a new cause of action based not upon the master and servant relation, then the plaintiff has no cause of action for damages against the defendants and respondents.

II.

Even if the Relation of Master and Servant Could be Supposed to Exist Between the Petitioner and the Soldier, No Cause of Action Rests in the Petitioner to Recover From a Third Party, Such as Respondents, the Money Paid by Petitioner to the Soldier for His Compensation as a Soldier During the Time He Was Incapacitated Nor for the Money Paid by Petitioner for the Hospital Expenses of Such Soldier.

Quite apart from the question heretofore discussed in this brief respecting the right or lack of right of the plaintiff to recover at all against the third person who has negligently caused personal injuries to the soldier, is the question as to what recovery may be had, if a right of action exists; that is, what is the measure of damages so far as the master is concerned? To this question we now direct attention.

It has already been pointed out that under Section 49, subdivision c, of the California Civil Code, the right of action there contemplated is one which accrues from an injury to a servant "which affects his ability to serve his master." In other words, the damages accruing to the master arise by reason of loss of service. This right of action is, of course, quite different from the right of action which the injured employee has against the third person as a result of the tortious injury.

A claim for damages for personal injuries belongs exclusively to the person injured. (*Franklin v. Franklin*, 67 Cal. App. (2d) 719.)

Such claim by the injured person consists of his right to recover (a) for his injuries, including detriment to his

health and physical capacity, and for physical suffering; (b) for loss of time, and in this respect his earning capacity is a proper element to be considered; and (c) for the reasonable expense of medical and hospital treatment and care. (*Campbell v. Los Angeles Traction Co.*, 137 Cal. 565, 568, 70 Pac. 624; *Hoffman v. Lane*, 11 Cal. App. (2d) 655, 106 Pac. 113; *Dewhirst v. Leopold*, 194 Cal. 424, 433, 229 Pac. 30; *Graeber v. Derwin*, 43 Cal. 495.)

Many other cases could be cited but these are sufficient for illustration.

Such claim resting in the injured person is not subject to assignment by him, nor to transfer by agreement, nor by operation of law, as by subrogation. He, and he alone, can recover. (*Franklin v. Franklin*, 67 Cal. App. (2d) 719; *Cassetti v. Del Frate*, 116 Cal. App. 255, 257, 2 P. (2d) 533; *Adams v. White Bus Line*, 184 Cal. 710, 195 Pac. 389; *Jackson v. Deauville Holding Company*, 219 Cal. 498, 27 P. (2d) 643.)

So, also, at common law two actions lie for personal injuries to married women, infants, and servants; one by the husband, father, or master for the loss of service, and the other by the husband and wife, the infant, or the servant for the personal injury. (*Lang v. Morrison*, 14 Ind. 599; *Bartley v. Richtmyer*, 4 N. Y. (Comstock) 38.)

In California, by statute (Code of Civil Procedure, Section 376), the father is given the right to maintain an action for an injury to his minor child. At Common Law that right was predicated upon the fiction that the infant was the servant of his father. It is true that in actions by a father for injuries to his minor child, the father, by reason of the parental relation and the inher-

ent liability resulting therefrom to care for, maintain, and support the child and by reason of the father's inherent right to receive the earnings of the child, is permitted to recover the pecuniary value of the child's services and also the cost of the child's medical and hospital treatment. A somewhat similar doctrine seems to have prevailed at Common Law with reference to apprentices and other menial servants who become a part of the master's family and to whom he stood in *loco parentis*.

Respecting a master and servant, however, we suggest that it is the doctrine generally held in the United States, both under the California Statutes and under the Common Law, that the two rights of action, one by the servant and the other by the master, are separate and distinct and do not overlap, and that in the servant rests the right of action for all his personal injuries, including his lost earnings and the expense of his hospitalization, whereas in the master rests only such damages as he may have sustained by reason of the loss of the services of his servant.

We have already pointed out that under California law the injured soldier, John Etzel, had a right of action for his personal injuries, his lost earnings, and his medical expense. This cause of action he had settled and compromised and in evidence of that settlement and compromise had given a full and complete release, which was introduced in evidence and marked Defendants' Exhibit "A." [Record, p. 9.] We have, then, in this case an anomalous situation of the plaintiff suing for two of the items of damage, to-wit: wages and costs of hospitalization which rested only and solely in John Etzel, the injured soldier. The plaintiff does not seek to recover any loss which it sustained by reason of the inability of

the soldier to perform his work as a soldier. In fact, it does not appear under the evidence that the plaintiff sustained any damage because the injured soldier was unable to perform his duties for a period of twenty-nine days. The plaintiff, in other words, attempts in this case to measure its damages by certain items of damage which belonged to the injured soldier and to him alone. This situation is adverted to in the case of *Commonwealth v. Quince,* which we considered at length in the foregoing section of this brief. In that case, quoting with approval from *Johnson v. Royal Mail Steam Packet Co.* (1867), L. R. 3 C. P. 38, at page 43, it is said:

> "the damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment; * * * A master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to his servant while alive and a pension to his widow when he is dead."

How, then, can there be any valid legal basis for plaintiff's claimed right to recover these items of damage, since the right of recovery rested in the injured soldier? It cannot be upon any theory of assignment or transfer because, as we have already pointed out, the authorities state definitely that such a claim of an injured person is not subject to assignment nor transfer by agreement. It cannot be on any theory of transfer by operation of law or by subrogation, for likewise the authorities are plain that such a claim of an injured man is not subject to assignment by operation of law or by way of subrogation. He, alone, has the right of action for his lost wages and

hospital expenses and he, alone, can enforce the same. When he executed his release, he satisfied the entire claim.

Then, too, it is the law in California that such a cause of action for damages for personal injuries cannot be split and recovered partly at one time and partly at another. (*Kidd v. Hillman*, 14 Cal. App. (2d) 507, 58 P. (2d) 662.) This case, in some respects, is not unlike the case at bar. The plaintiff brought an action for damages to person and property resulting from an automobile accident caused by the defendant's negligence. In this action, she obtained a judgment and executed a release to the defendant of all liability. Subsequently, another action was brought for damages to her automobile upon the theory that the insurance company, having indemnified her for the damage to her machine, had become subrogated to her right of action and therefore should be permitted to recover for the damage to the automobile. It was held that the release signed by the plaintiff was binding on the insurance company; that the cause of action for damages arising out of the action could not be split, and that in this respect the insurer was in no better position than the insured. The action was barred both by the release and by the rule forbidding the splitting of the cause of action.

See, also, to similar effect:

Grain v. Aldrich, 38 Cal. 514, 519;

Van Horne v. Treadwell, 164 Cal. 620, 622, 130 Pac. 5;

Herriter v. Porter, 23 Cal. 385.

Authorities elsewhere in the United States are persuasive against there being any right of recovery in an employer for such items as those for which the plainitff sues in the case at bar. (*Interstate Telephone & Telegraph Co. v. Public Service Electric Co.*, 86 N. J. Law, 26, 90 Atl. 1068.)

This case discusses generally the question as to whether an employer has any right to recover wages and medical bills paid to or for an employee and answers the question in the negative, pointing out that what the employer loses is the value of the services to him and that what the plaintiff employer there was seeking to recover was the value of the services paid to the employee.

So, also, in the case at bar the items of wages which the petitioner seeks to recover is the "value of the services to the employee," if he be presumed to be an employee for the sake of the argument.

City of Philadelphia v. Philadelphia Rapid Transit Company, 337 Pa. St. 1, 10 A. (2d) 434. In this case it appears that certain firemen, employees of the plaintiff, had been injured by the negligence of the defendants. The firemen brought a separate suit against the defendant, and recovered judgments aggregating $25,000. In these suits, they made claim for loss of wages and cost of medical care but offered no evidence thereof. The city, under compulsion of Pennsylvania statutes, continued to pay full wages to the firemen during their disability and also all medical and hospital bills occasioned by the injuries, the total sum aggregating in excess of $6000. The city then brought this suit to recover from the defendant the amount of such payments. It was held that the city could not recover and the court adverts to the

rule which we have shown prevails in California to the effect that the right to recover lost wages and medical bills rests in the injured employees and might have been enforced in the employees' action and that the law does not permit of the splitting of an action between the employees and the employer. The court points out that no attempt was made to establish expense of the city's loss by reason of the incapacity of the firemen. The same situation exists in the case at bar.

Chelsea Moving & Trucking Co., Inc. v. Ross Towboat Co., 280 Mass. 282, 182 N. E. 477. In this case the plaintiff employer had continued to pay to his employee, as provided for in a contract with the employee, the amount of the latter's wages during the time he was laid up by reason of the injuries tortiously inflicted by the defendant. The plaintiff sued for this payment. The case is important because it discusses the rule as applicable to master and apprentice and parent and child and denies any right of recovery in the plaintiff employer for the wages paid, saying that the loss of wages was a part of the injury which the injured employee sustained.

See, also, *Northern States Contracting Company v. Oakes*, 191 Minn. 88, 253 N. W. 371, holding that a contractor cannot recover from a sub-contractor for increased workmen's compensation insurance premiums which the contractor was compelled to pay in consequence of an employee's death caused by the sub-contractor's negligence as this was a too remote and indirect result of a wrongful act.

Closely akin to the foregoing cases and involving the same general rule of law are the following cases which support the general rule that a tort to one person does not

make a tort feasor liable to another person merely because the injured person was under a contract with that other. *Robins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303, 72 L. Ed. 290; *The Federal No. 2*, 21 F. (2d) 313 (C. C. A. 2d); *The Toluma*, 72 F. (2d) 690, 693; *Brink v. Wabash Railroad Company*, 160 Mo. 87, 60 S. W. 1058; *Connecticut Mutual Life Insurance Company v. New York & New Haven Railroad Co.*, 25 Conn. 265; *Byrd v. English*, 117 Ga. 191, 43 S. E. 419.

It is pointed out in the case of *The Federal No. 2*, above cited, in which an attempt was made by a master to recover hospital expenses which he had paid for his employee in consequence of a tortious injury to the latter, that if the employee make settlement of his claim, that, in any event, would put an end to the matter. In any event, there was no cause of action.

It is implicit in the argument on behalf of petitioner that since the government paid the injured soldier his compensation while he was laid up and also paid his medical expenses, this in some manner, not exactly explained, took away from the injured soldier any right on his part to recover these items from the defendant and the assumption was sought to be made by this that the right passed to the petitioner.

This argument that the master may recover for hospital expenses and wages is made at the bottom of page 12 of the petition and on page 13 certain authorities are cited as bearing this out. We shall examine them briefly.

The first is *Cooley on Torts*, 4th Ed., Section 180. The text referred to is a brief statement to the effect that wrongs which a master may sustain "are substantially confined to being deprived of services." Then follows the

statement that connected with this may be incidental damages such as expenses of care of the servant when the loss is occasioned by some violence to the servant so that this care devolves upon the master. This statement in the text is not supported by the citation of even a single case and it is followed by the somewhat significant statement that the principles which govern the recovery had been sufficiently indicated in that part of the text dealing with parent and child, thus indicating that the learned author is perhaps confusing the right of a parent to recover for the expense of the care of his child with the action of a master to recover for loss of services. Certainly, in California these two actions are separate and distinct, one provided for in Section 49, subdivision c, of the Civil Code covering the right of a master to bring an action for injury to his servant "which affects his ability to serve his master," and the other provided for in Section 376 of the Code of Civil Procedure giving the father the right to maintain an action for injuries to his minor child.

The next case cited is *Attorney General v. Valle-Jones,* upon which we have already commented and in which the question here at issue went by default.

The next case of *Smaill v. Alexander,* 23 N. Z. L. R. 745, is the only one cited by petitioner tending to support the argument in the petition. As is noted, it arose in New Zealand and from the opinion it appears that the master was permitted to recover medical expenses incurred for a servant injured by the assault of the defendant. The statement is made in the case that if the master could not recover, it would follow that the wrongdoer would not be liable to anyone for the costs of medical attendance for the reason that the injured man could

not recover because he had never paid them. This statement, however, is contrary to the majority rule in the United States, as we have shown elsewhere in this brief.

The next case is *Dixon v. Bell*, 1 Stark 287. This, again, was an action by a father for loss of services of his son and medical expense and was not an action by a master.

The next citation is *Reeve Domestic Relations* (4th Ed. 1888) 487. The text on page 487 has nothing to do with the matter under consideration. It involves the right of a master to recover damages for the enticement of his servant. However, in the next preceding page—that is, page 486 of the text, the author here considered the right of a master to recover where his servant has been injured and this text definitely supports the view for which we have been arguing, indicating that the master may have a right of action in the case of slaves, apprentices, and children, then saying:

> "But in case of a hired servant, the servant must ultimately be at all the expense himself; and such expense will be a part of the damages which belong to him. If the beating be such as occasion no loss of services, the master is not entitled to recover anything."

The next and last case cited is that of *Woodworth v. Washburn*, 2 Denio, 369, 374. No question of medical or other expense was involved. The sole and only question decided was whether the plaintiff could recover for loss of services of his hired man who was by the defendant locked in the latter's bank for about thirty minutes. The plaintiff recovered six cents damages in the Justices' Court, which judgment was reversed by the Court of Common

Pleas but was restored by the opinion of the Supreme Court. There is dictum in the case to the effect that a master may recover consequential damages where the injury is done to his slave, servant, apprentice, or minor child when the master stands in the place of a parent. *Reeve Domestic Relations* above referred to shows that this rule does not apply to hired servants.

We have already shown that the right to recover lost earnings and medical and hospital expense rested in the injured soldier and that he could not by assignment, subrogation, or operation of law transfer such right to anyone else.

Furthermore, it is not the law, as we understand it, that lack of legal obligation on the part of the injured person to pay for medical and hospital expenses deprives him of his right to recover the reasonable value thereof. Nor is it the law that the continued payment to the person injured of his lost wages during his period of disability either by his employer or someone else or the discharge of the bills for the injured person's medical and hospital treatment by his employer or someone else, takes away from the injured person the right which the law places in him to recover such items of damage from the tort feasor. It is, we believe, the majority rule in the United States that an injured person may recover the reasonable value of his medical and hospital treatment, as well as lost wages, even though someone else has paid for the medical care and even though the injured person's employer has continued to pay his wages.

The rule is thus stated in Volume 4 of Restatement of the Law of Torts, page 633, Section 924, clause c:

> "The damages are not reduced by the fact that the plaintiff has suffered no net financial loss as the re-

sult of the entire transaction, as where he receives insurance money or an amount equal to his lost wages from his employer or from a friend (see §920, Comment e)."

See, also, in the same Volume, Section 920, subdivision , at page 620, which is to the same effect.

The rule thus stated in the Restatement of the Law is supported by the authorities.

In the case of *Cunnien v. Superior Iron Works Company, et al.*, 175 Wis. 172, 188, 184 N. W. 767, the Supreme Court of Wisconsin states the rule as follows:

> "It also seems to be the prevailing doctrine in this country that, where the salary of an injured person is continued by his employer during the time of his inability to perform services, such payment is no ground for diminution of the damages to be paid by the one who has caused the injury."

There is a note to this case in 18 A. L. R. 678, citing numerous cases to the same effect. The case is, further, very pertinent here because it involved the right of a member of the Naval Forces of the United States to recover for lost wages notwithstanding payment of wages and compensation to him by the Navy. The injured plaintiff was hurt in an automobile accident due to the negligence of the defendant. He was paid by the United States certain sums under the terms of Government Statutes during his period of disability. The jury found that his lost earnings amounted to $1500. The trial court, in its judgment, deducted this $1500 from the total of the damages as fixed by the jury on the theory that the government had already paid the injured plaintiff for his lost earnings. The Supreme Court held that this

was improper and that judgment should have been rendered for the full amount by the jury.

See to similar effect:

Wood v. Ford Garage Co., 162 Misc. 87, 293 N. Y. Supp. 999, 1003; affirmed 252 App. Div. 921; 300 N. Y. Supp. 1358;

Shea v. Rettie, 287 Mass. 454, 192 N. E. 44, 95 A. L. R. 571;

Gatzweiler v. Milwaukee Electric Railway & Light Company, 136 Wis. 34, 116 N. W. 633;

Harding v. Town of Townshend, 43 Vt. 536.

All of the foregoing cases support the rule that the mere fact that an injured employee has received wages from his employer or compensation by insurance or accident policy is no ground for diminution of the damages which should be paid to him by the tort feasor.

The California authorities also lend support to the majority rule mentioned above and hold in general that the wrongdoer should not be permitted to profit by any payment by others to or for the injured person.

Gastine v. Ewing, 65 Cal. App. (2d) 131, 150 P. (2d) 26;

Loggie v. Interstate Transit Company, 108 Cal. App. 165, 291 Pac. 618;

Benach v. Market Street Railway Company, 29 Cal. App. (2d) 641, 647;

Reichle v. Hazie, 22 Cal. App. (2d) 543, 71 P. (2d) 849;

Purcell v. Goldberg, 34 Cal. App. (2d) 344, 93 P. (2d) 578.

From the authorities cited and for the reasons above set forth it is apparent that the right of action for lost wages and medical expenses rested in the injured man and not in the plaintiff, and that such right of action was not transferable by the injured man to the plaintiff, or at all, either by assignment or operation of law. Therefore, even if the injured man had not released his cause of action by the complete settlement which he made, nevertheless the plaintiff has not and cannot have any cause of action for the items sued for.

The trial court in its opinion relies for authority largely upon the foregoing cited English case of *Attorney General v. Valle-Jones* in its conclusion that Etzel, the injured soldier, had no right to recover for lost wages and hospital expenses. We have shown that in the United States the rule is otherwise and that the injured person continues to enjoy the right of recovery notwithstanding payment by his employer of wages and hospital expenses, the basis of the rule being that the tort feasor is not entitled to profit by reason of moneys which have been paid out by others for the benefit of the injured person. In England, however, a contrary rule seems to prevail and there a tort feasor is entitled to the benefit of payments received by the person injured as a bounty, pension, or under contract. See Note in 95 A. L. R. 580; 18 A. L. R. 688. An English case, therefore, is a poor basis upon which to rest any conclusion concerning this particular matter.

We respectfully suggest that for all the reasons heretofore stated, the District Court erred in its conclusions,

that the reversal of its decision by the United States Circuit Court of Appeals was correct and that under no applicable law, whether federal law, California law, or common law, is there any right of recovery in the petitioner by reason of the relation existing between the petitioner and the soldier, nor in any event is there any right of recovery for the particular items sued for, and that therefore the petition for writ of certiorari should be denied.

Respectfully submitted,

JENNINGS & BELCHER,
By FRANK B. BELCHER,
Attorneys for Standard Oil Company of California and Ira Boone.